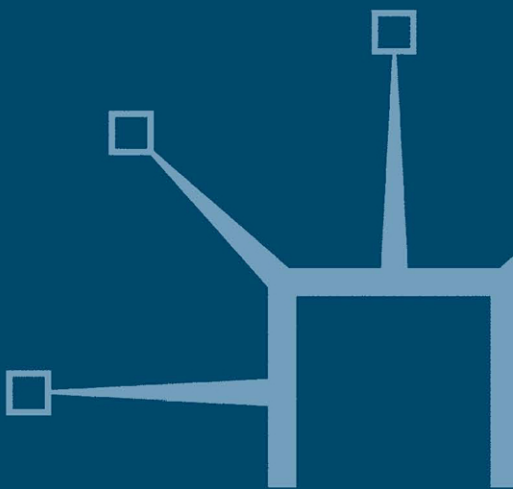
palgrave
macmillan

Creative Labour Regulation

Indeterminacy and Protection in an Uncertain World

Edited by

Deirdre McCann, Sangheon Lee,
Patrick Belser, Colin Fenwick,
John Howe and Malte Luebker



Creative Labour Regulation

Advances in Labour Studies

Advances in Labour Studies is a wide-ranging series of research titles from the International Labour Office (ILO), offering in-depth analysis of labour issues from a global perspective. The series has an interdisciplinary flavour that reflects the unique nature of labour studies, where economics, law, social policy and labour relations combine. Bringing together work from researchers from around the world, the series contributes new and challenging research and ideas that aim both to stimulate debate and inform policy.

Published in the series

THE LABOUR MARKETS OF EMERGING ECONOMIES: HAS GROWTH TRANSLATED INTO MORE AND BETTER JOBS? (*by Sandrine Cazes and Sher Verick*)

BEYOND MACROECONOMIC STABILITY: STRUCTURAL TRANSFORMATION AND INCLUSIVE DEVELOPMENT (*edited by Iyanatul Islam and David Kucera*)

WAGE-LED GROWTH: AN EQUITABLE STRATEGY FOR ECONOMIC RECOVERY (*edited by Marc Lavoie and Engelbert Stockhammer*)

REGULATING FOR DECENT WORK: NEW DIRECTIONS IN LABOUR MARKET REGULATION (*edited by Sangheon Lee and Deirdre McCann*)

CREATIVE LABOUR REGULATION: INDETERMINACY AND PROTECTION IN AN UNCERTAIN WORLD (*edited by Deirdre McCann, Sangheon Lee, Patrick Belser, Colin Fenwick, John Howe and Malte Luebker*)

SHAPING GLOBAL INDUSTRIAL RELATIONS: THE IMPACT OF INTERNATIONAL FRAMEWORK AGREEMENTS (*edited by Konstantinos Papadakis*)

TOWARDS BETTER WORK: UNDERSTANDING LABOUR IN APPAREL GLOBAL VALUE CHAINS (*edited by Arianna Rossi, Amy Luinstra and John Pickles*)

Creative Labour Regulation

Indeterminacy and Protection in an Uncertain World

Edited by

Deirdre McCann

Sangheon Lee

Patrick Belser

Colin Fenwick

John Howe

and

Malte Luebker

palgrave
macmillan

Softcover reprint of the hardcover 1st edition 2014 978-1-137-38220-7

The designations employed in ILO Publications, which are in conformity with United Nations practice, and the presentation of material therein, do not imply the expression of any opinion whatsoever on the part of the International Labour Office concerning the legal status of any country, area or territory or of its authorities, or concerning the delimitation of its frontiers.

The responsibility for opinions expressed in signed articles, studies and other contributions rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office of the opinions expressed in them.

Reference to names of firms and commercial products and processes does not imply their endorsement by the International Labour Office, and any failure to mention a particular firm, commercial product or process is not a sign of disapproval.

First published 2014 by PALGRAVE MACMILLAN and the INTERNATIONAL LABOUR OFFICE

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

Palgrave Macmillan

ISBN 978-1-349-47994-8 ISBN 978-1-137-38221-4 (eBook)
DOI 10.1057/9781137382214
ILO ISBN 978–92–2–127820–7

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

Typeset by MPS Limited, Chennai, India.

Contents

List of Figures and Tables

Figures

Tables

Preface and Acknowledgements

In the scholarly world, simplistic accounts of the impact of labour regulations are slowly ceding ground to more sophisticated analyses. Yet policy agendas since the global economic crisis have called for regulatory frameworks to be dismantled, in the name of recovery. Novel approaches are vital if we are to improve the lives of the global workforce in the post-crisis era. Yet the project of labour market regulation is inevitably complex, and its outcomes – social and economic – difficult to predict.

This volume brings together researchers from diverse scholarly traditions to reflect on this complexity. It builds on its predecessor volume (Lee and McCann (eds), *Regulating for Decent Work*, 2011) by acknowledging and investigating the unpredictability of regulatory outcomes, identifying the factors that drive this uncertainty and suggesting creative approaches towards protective objectives. The contributions offer a depth and range of analyses that only an interdisciplinary approach can elicit. They also assume that the solutions to interlinked global problems will be found through international dialogue. The book therefore reflects the merits of the Regulating for Decent Work Network, in its commitment to interdisciplinarity, international outlook and interest in novel research questions and in creative regulatory solutions.

Our thanks are due first to our contributors, for their commitment to the Regulating for Decent Work project and willingness to engage with the rewards and irritations of interdisciplinary engagement. Their contributions, we would contend, highlight the vigour and importance of the contemporary interdisciplinary study of labour regulation.

These contributions were initially aired at the second conference of the Regulating for Decent Work Network at the International Labour Office (ILO) in Geneva, 6–8 July 2011. We are privileged to benefit from the insights and engagement of this thriving network of researchers and policy-makers. The conference was organized by the ILO in collaboration with the University of Manchester Fairness at Work Research Group and the University of Melbourne Centre for Employment and Labour Relations Law. We are grateful for the support of our friends and colleagues on the Organizing Committee: Helge Hoel, Adriana Marshall, Jillian Murray, Anne Posthuma and Jill Rubery.

At the ILO, we have relied on the help and encouragement of Duncan Campbell, Sandrine Cazes, Assane Diop, Philippe Marcadent, Gerry Rodgers

and Manuela Tomei. All have supported the Network from the outset, as part of their broader commitment to encouraging dialogue between policy-makers and researchers, and to properly understanding the role of legal regulation in ensuring decent work.

Carola Nolte was again invaluable to the conference organization, deftly rising to the challenge of hosting 300 participants from around the world. We are grateful also to friends and colleagues who chaired sessions, and others who contributed in various ways, including Claire Piper, Coralie Thompson and Sunny Lee.

We particularly appreciate the ILO's continuing funding of our Regulating for Decent Work Fellowships, which enable a number of scholars from developing countries to participate in the conference. The University of Melbourne Centre for Employment and Labour Relations Law generously funded the Decent Work Prize, which recognized the important work of two scholars who have contributed to this volume, Fernando Groisman and Ada Ordor.

The ILO's publishing unit again provided invaluable support in steering this volume to publication. Thanks are due in particular to Chris Edgar for his patience and enthusiasm, and to Charlotte Beauchamp and Alison Irvine. We remain grateful to the ILO and Palgrave Macmillan for their continued commitment to the work of the Regulating for Decent Work Network as part of the Advances in Labour Studies series. Our appreciation is also due to Sara Martinsson for her conscientious assistance in preparing the manuscript.

Finally, on behalf of the contributors we extend our appreciation to the three anonymous reviewers for their valuable and constructive comments and to Guy Mundlak for his enduring enthusiasm for this project.

Notes on Contributors

Matthew Amengual is Assistant Professor at the Massachusetts Institute of Technology and a member of MIT's Institute for Work and Employment Research. He conducts research on the politics of labour regulation in Latin America, focusing on issues of implementation and the interaction between state and private regimes.

Patrick Belser is a Senior Economist at the International Labour Office in Geneva, where he is the principal editor of the ILO *Global Wage Report*. He has published various articles on wage-related issues and co-edited *Forced Labor* (ILO/Lynne Reiner, 2009, with Beate Andrees).

Gerhard Bosch is Professor at the University of Duisburg-Essen and Director of the Institute for Work, Skills and Training. He has published widely in the areas of employment systems, low wages, working time, industrial relations and vocational education and training. Recent publications include (as co-editor) *European Employment Models in Flux* (Palgrave Macmillan, 2009) and *The Welfare State and Life Transitions* (Edward Elgar, 2010).

Drusilla Brown is Associate Professor at Tufts University. Her primary area of research is in the application of large scale general equilibrium models to the study of international economic integration in the Western Hemisphere. She has also undertaken research on trade policy concerning international labour standards and child labour. Recent publications include articles in the *Journal of Economics Perspectives*, *The World Economy* and the *Review of International Economics*.

Rajeev Dehejia is at the Wagner School of Public Service at New York University. His research spans econometrics, development economics and labour economics, with a focus on program evaluation methods and applied micro-empirical policy research. His publications include papers in the *Journal of Development Economics, Quarterly Journal of Economics, Review of Economics and Statistics, Journal of Business and Economic Statistics* and Journal of the American Statistical Association. He is a co-editor of the *Journal of Human Resources*.

Colin Fenwick is a Senior Labour Law Specialist at the International Labour Office in Geneva. Before joining the ILO he was a faculty member

at Melbourne Law School, where he served for periods as Director of the Centre for Employment and Labour Relations Law and as (joint) Editor of the *Australian Journal of Labour Law*. His research interests are in comparative, international and Australian employment and labour law. His current work and research focus on the establishment of labour law systems in developing economies; his publications include *Human Rights at Work: Legal and Regulatory Perspectives* (Hart, 2010, with T. Novitz).

Mark Freedland QC FBA is Professor of Employment Law and a Senior Research Fellow in the Oxford University Law Faculty, and also an Honorary Professor at University College London. His main current research interests are in the legal analysis of personal work relations and in the law of labour migration.

Damian Grimshaw is Professor of Employment Studies at the University of Manchester and Director of the European Work and Employment Research Centre (EWERC). Recent publications include *Minimum Wages, Pay Equity and Comparative Industrial Relations* (Routledge, 2013).

Fernando Groisman is a Researcher at the National Council of Scientific and Technical Research (CONICET) and professor at the University of Buenos Aires. His main research topics are related to the functioning of labour markets, distributional issues and labour standards and policies with a special focus on developing countries. He is Director of the Research Centre in Labour, Distribution and Society (CITRADIS).

John Howe is Director of the Centre for Employment and Labour Relations Law at the Melbourne Law School. His research interests include regulatory theory, corporate accountability and labour law. He is co-editor of *Labour Law and Labour Market Regulation* (Federation Press, 2006) and author of *Regulating for Job Creation* (Federation Press, 2008). He presently serves on the Organizing Committee of the Regulating for Decent Work Network, the Steering Committee of the Labour Law Research Network and the Editorial Committee of the *Australian Journal of Labour Law*.

Sangheon Lee is the Research and Policy Coordinator at the Conditions of Work and Equality Department of the International Labour Office. He specializes in analysing and monitoring changes in wages and working conditions with a view to developing improved policy responses. He has written extensively on working conditions issues. He recently edited a special issue of *International Labour Review* focused on low-wage work in emerging economies. He was one of the main authors of the *Global Wage Report 2010/11* (ILO, 2010) and is a coordinator of the

Regulating for Decent Work Network. He holds a PhD in economics from Cambridge University.

Malte Luebker is Senior Regional Wage Specialist at the ILO Regional Office for Asia and the Pacific in Bangkok. He was the principal author of *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO, 2012). His main research interests are wages and income distribution. Prior to joining the ILO, he was a lecturer in Political Science at the Martin-Luther-University Halle-Wittenberg (Germany).

Deirdre McCann is a Reader in Law at Durham University. Her research is in the field of labour law and policy at the domestic and international levels and has a particular focus on the regulation of precarious work, conditions of work, and the influence of state norms in low-income settings. Her publications include *Regulating Flexible Work* (Oxford University Press, 2008). She is a former official of the International Labour Office and a coordinator of the Regulating for Decent Work Network.

Chikako Oka is Lecturer at Royal Holloway, University of London. She received her PhD from the London School of Economics and her thesis won the Thomas A. Kochan and Stephen R. Sleigh Best Dissertation Award in 2010. Her research interest lies at the intersection of management and labour regulation.

Ada Ordor is the Director of the Centre for Comparative Law in Africa at the University of Cape Town. She has studied and taught in law schools in Nigeria and South Africa and has held research fellowships in the United States and South Africa. She publishes on issues of law in development.

Raymond Robertson is Professor of Economics at Macalester College. His research on trade and labour has appeared in top economics journals, including the *American Economic Review*. He is currently the chair of the US Department of Labor's National Advisory Committee on Labor Provisions of Free Trade Agreement (NAC).

Jill Rubery is Professor of Comparative Employment Systems, Manchester Business School, University of Manchester. She has published widely on comparative employment systems including the future of European social models. Recent publications include *Women and Austerity* (Routledge, 2013, with M Karamessini). Her research has been funded by various bodies including the European Commission, the ILO, the World Bank and the OECD.

David Weil is Professor of Markets, Public Policy and Law at Boston University School of Management and co-director of the Transparency Policy Project at Harvard's Kennedy School of Government. He is a leading international expert on workplace restructuring and regulatory policy and author of *The Fissured Workplace* (Harvard University Press, 2014).

Steven L. Willborn is the Judge Harry A. Spencer Professor of Law at the University of Nebraska College of Law. He has been on the Nebraska faculty since 1979 and served as Dean of the Law College from 2000 to 2009. He is President of the International Association of Labor Law Journals and has been Chair of the United States Branch of the International Society for Labor and Social Security Law. He is co-author of the leading American textbook on employment law and a leading treatise on the use of statistics in employment discrimination law.

Part I
Introduction

1

Regulatory Indeterminacy and Protection in Contemporary Labour Markets: Innovation in Research and Policy

Sangheon Lee and Deirdre McCann[1]

Introduction

The first volume drawn from the work of the Regulating for Decent Work network, *Regulating for Decent Work: New Directions in Labour Market Regulation*, responded to the simplistic empirical studies on the economic impact of labour regulations that have become increasingly influential since the 1990s (Lee and McCann 2011a). That volume identified the use of indicator-based methodologies to quantify and compare labour regulations, most prominently in the World Bank's Doing Business project, as a key evolution in the deregulatory project that has been associated with Washington consensus policy agendas and fuelled by the neoclassical economic tradition (Lee and McCann 2011b). This empirical work, and its absorption into policy discourses, was argued to significantly expand the deregulatory narrative along two axes: (1) to extend the preoccupation with minimum wage and employment protection laws to other facets of labour law; and (2) to reach beyond the advanced industrialized economies more firmly to embrace the regulatory frameworks of the developing world (Lee and McCann 2008).

The earlier volume exposed a set of assumptions about the nature and functioning of legal rules that is embedded in these theoretical and policy literatures. Deakin's (2011) critique of neoclassical economic analysis laid bare the theory of the operation of regulatory frameworks that underpins this work. He singled out two related assumptions: that legal rules are exogenous to market relations (and so operate as an external imposition) and that they are 'complete' (in the sense of being certain in scope and self-executing). The literature on the economic impact of labour laws was identified by Lee and McCann (2011c) as harbouring

two apparently contradictory accounts of legal regulation. A 'formalist' narrative, characteristic of the most prominent legal indices, assumes labour regulations to be comprehensive (protecting all workers within their formal ambit) and complete (workers are entitled to the full array of legal protections, to the maximum permissible extent). The policy discourse, however, simultaneously harbours a pessimistic account of legal regulation, which implicitly depicts labour laws as largely irrelevant to a large segment of the developing world labour force. This latter account hinges on a clear-cut dichotomy between the 'formal' and 'informal' economies, in which labour standards emerge as unknown in, or entirely irrelevant to, the latter (see, e.g., World Bank 2005).

Many of the papers in the earlier volume, in contrast, implicitly adopted a neo-institutional account of legal regulation, in which legal rules are endogenous to market processes (Deakin 2011) and in which political structures and laws are neither self-executing nor operate by enforcement alone (see Frey's (2011) elaboration of a diagnostic methodology for improving labour market regulation and Lee and McCann (2011c) on the awareness of statutory standards in Tanzania). Drawing on this model, labour regulations can be understood as the outcomes of evolutionary processes that hinge on a wide range of contextual factors (Deakin 2011). As a consequence, similar regulatory frameworks, even of the same 'legal origin', can generate diverse economic outcomes.

Subsequent advances in both empirical and theoretical studies have confirmed that the impacts of labour regulation are difficult to predict a priori. Since the previous Regulating for Decent Work volume, there have been signs of progress in the economic research towards more rigorous and contextual thinking about the operation of labour market regulations. A series of empirical studies has generated outcomes at odds with the theoretical predictions of standard textbook economics. A recent survey by MacLeod (2011) of empirical evidence on the impacts of employment protection laws, for instance, concluded that theoretical predictions about negative employment impacts lack empirical grounding (table 2).[2] Similar conclusions have been reached with respect to minimum wage laws (see ILO 2010 for a review and Groisman in this volume on Argentina).

It can be hoped that this growing body of empirical research will sustain a reconsideration of the theoretical framework that guides most of the empirical studies, and perhaps trigger a quest for a more suitable theory. This development is crucial, in that policy decisions in the area of labour regulation are often driven by theory (the assumption, for example, that any form of 'non-market' intervention generates distortions and inefficiencies). As Deakin has noted,

> [M]ore constraining is the role that theory, relatively uninformed by empirical work, plays in shaping policy perceptions … Refutation of the theory will not occur through new empirical findings alone. However, empirical work may play a role in shifting some of the theoretical underpinnings of the model. This is beginning to happen with the growing use of transaction economics and behavioural approaches to theorize labour market institutions, but the process is slow. (2011, p. 53)

More recent work has produced significant improvements in the conceptualization of legal regulation in economic theory, primarily from within the traditions identified by Deakin. This contention is illustrated by a number of contributions to the *Handbook of Labor Economics* (2011). Charness and Kuhn (2011) review recent studies grounded in behavioural economics and laboratory experiments, which explore the relationship between worker and firm and its productivity outcomes. This research demonstrates the worker/firm relationship to be far more complex than is typically assumed in conventional theory, allowing a role for fairness, trust and institutions. Boeri (2011) also argues that studies on regulatory impacts in Europe have paid insufficient attention to institutional interactions and enforcement, calling for a 'more realistic theory of the effects of institutional reforms on the labor market' (p. 1222).

In the field of transaction economics, the employment contract is recognized to be incomplete, leaving space for discretion and uncertainty. Within this tradition, MacLeod (2011) has highlighted the importance of regulatory design, which is often neglected in economic empirical research. Taking the example of employment protection laws he concludes that,

> [E]conomic research uses a relatively crude representation of the law. We know virtually nothing about how specific legal rules interact with different types of worker-firm matches. At a policy level, employment protection entails changes to specific rules, such as the number of days' notice for a dismissal, mandatory dismissal payments, and specification of the conditions under which a protected employee may be dismissed. At the moment, policymakers have little guidance on how to set these parameters, aside from the blanket recommendation to reduce them all. (p. 1685)

Similarly, Manning (2011) questions the relevance of the perfect labour market assumption that underpins both theory and empirical

models. Realistic modifications to the assumption of imperfect competition in the labour market, he demonstrates, generate different predictions about the impacts of labour regulation on labour market outcomes. In line with MacLeod's review (2011), Manning argues that the imperfect labour market creates 'rents' within the employment relationship, estimated to range from 15–30 per cent. He further notes that 'it is the very existence of rents that gives the "breathing-space" in the determination of wages in which the observed multiplicity of institutions can survive' (pp. 995–6) This observation implies that institutional interventions in wage determination, notably through legal regulation and collective bargaining, could have positive outcomes in terms of wages, employment and productivity (as has been demonstrated in numerous empirical studies; see further MacLeod 2011).

The difficulties, highlighted by these studies, of establishing a clear linkage between labour regulations and labour market performance effects was noted in the first Regulating for Decent Work volume, by drawing on the notion of 'regulatory indeterminacy'. This notion emerged in Deakin and Sarkar (2008) as a critique of standard economic analysis, to convey that the economic effects of a labour law reform project are a priori indeterminate. It has since been extended by Lee and McCann (2011b) to capture uncertainty in the protective capacities of labour law – distinct from, although related to, its economic impacts.

The repercussions of recognizing regulatory indeterminacy have been suggested to be wide-ranging: to imply, for example, efforts to craft economic models that capture the intricacies of regulatory design and implementation; to embed in legal indictors a more complex grasp of the regulatory subject and of legal effectiveness; to design research and policy interventions beyond indicator-based strategies; and to discard any assumed irrelevance of state norms in low-income settings (Lee and McCann 2011b). It is now of some urgency to elaborate with more precision the pressures that drive and underpin regulatory indeterminacy. That task is the central aim of this volume.

Regulatory indeterminacy, in its extended elaboration, has implicitly been attributed to a number of factors. Context-specific origins are the most prominent suggestion. The 'legal origins' thesis associated with the indicators project offers as its central claim that the legal family to which a given system belongs has outcomes in both regulatory style and economic impacts (Botero et al. 2004). Indicator-based strategies, however, have since been deployed to test this hypothesis, and have revealed it to be unconvincing. A longitudinal labour law index developed at the Cambridge Centre for Business Research (CBR) to measure the

convergence of labour law systems found an absence of a consistent legal origins effect (Deakin, Lele and Siems 2007). This work has been extended to Australia by Mitchell et al. (2011) with similar outcomes.

In contrast, institutional and regulatory design is clearly crucial in shaping the effects of labour regulation. 'Human error' in the drafting of legal provisions, for example, tends to generate legislative instruments that do not function as expected. This phenomenon is relatively common in low-income countries, especially when legal reforms are carried out in a hasty manner under political pressure. In a study of wage protection laws in Africa, for example, Ghosheh (2012) found many of the countries in the region to have legislation of fundamentally sound design. Frequently, however, these laws were found to lack one of the essential components of wage protection frameworks, namely an explicit definition of 'wages'. They also often contained insufficiently detailed guidance on the role of enforcement mechanisms, and in particular labour inspectorates. As a result, African labour law frameworks, although commonly equated in labour law indices with 'rigid' regulation (see, e.g., World Bank 2011), in reality often have negligible effects on the practice of working relations. On a more positive note, this insight also implies that potentially negative impacts of legal reforms can be alleviated, or even removed, through skilful and creative legal design (see Belser and Sobeck 2012; Lee 2012).

This volume, however, centres on three other of the drivers of regulatory indeterminacy: (1) the accelerating fragmentation of labour markets into diverse forms of employment; (2) the complex interactions between labour market institutions; and (3) the impediments to effective implementation of labour norms. These factors are posited as the key variables that generate regulatory indeterminacy in contemporary labour markets. As such, they are contended to be essential to scholarly and policy projects that aim properly to understand and to realize the demands of effective legal regulation. These factors are discussed in turn in the following sections. The aim is to highlight the significance of each component of indeterminacy, and to indicate how the available knowledge on these factors is advanced by the chapters in this volume. Research and policy responses are suggested in the Conclusions.

A broader aim, shared with the first Regulating for Decent Work volume, is to bring to bear the preoccupations, concepts and methodologies of a range of academic disciplines to the complexities of labour market regulation. An intuition that the proximity of discrete scholarly fields and traditions will generate useful insights is borne out in this volume. This interdisciplinary ethos serves to highlight urgent research themes,

air new findings and offer novel concepts, theories and methodologies. Contributions to the volume also confirm the faith in comparative international research that lies at the heart of the Regulating for Decent Work project. The book addresses countries and regions of diverse socio-economic contexts and institutional traditions (Argentina, Cambodia, Europe, South Africa, the United States and Vietnam). The chapters that follow examine regulatory strategy in these different settings to produce findings that both enrich and challenge the global debates.

Regulating the fragmented labour market: theory, doctrine and enforcement

Labour market fragmentation unleashes the potential for divergent application of legal entitlements and obligations across a range of regulatory subjects. It is therefore an essential element of any typology of the components of regulatory indeterminacy. Fragmentation is associated with a range of processes, centrally the heightened recourse to 'non-standard' working arrangements that has characterized hiring strategy in recent decades, and the intersecting pressures that generate informality (see, e.g., Vosko 2000; Fudge and Owens 2006; Stone 2013). Labour market fragmentation therefore triggers substantial variation in the effectiveness of regulatory frameworks. Yet these variations are proving difficult to conceptualize in labour regulation research, and in particular to capture through the use of empirical methods, inhibiting the accurate understanding of the nature and influence of labour regulation.

This point can be illustrated by considering the indicators project. Indices-based research has been expanded to cover a wider range of countries and regulatory sub-fields. The 'leximetric' methodology developed by the CBR (Deakin, Lele and Siems 2007) has recently been extended to Australia (Mitchell et al. 2011) and India (Gahan et al. 2012) and a labour market regulation index has been developed for the International Monetary Fund (IMF) by Aleksynska and Schindler (2011). Legal indictors have also been designed that gauge not only intensity of regulation but also the effectiveness of regulatory interventions (the influence of regulatory frameworks on the practices of working life) (Lee and McCann 2008; Sari and Kucera 2011).

Yet the most prominent indicators are ill-attuned to capturing the range of work relations that either entirely elude legal regulation or are subject to diminished standards. To do so, legal indices must accurately incorporate exceptions to, and permissible derogations from, regulatory

instruments. In particular, exclusions – of sectors, occupations, small firms, agency work and other 'dispatched' relationships etc. – must be accounted for. Indeed, it can be contended that measurement projects that lack such a component have a potential risk of bias, and may even be misleading. These features are measured by the CBR indices (Deakin, Lele and Siems 2007). Their absence is most transparent in the indicator devised by Botero et al. (2004), and subsequently adapted in the World Bank's Doing Business index, which is explicitly concerned with the application of regulatory frameworks to the 'standard' model of both worker and employer.[3] This limitation reflects a broader deficiency of the indicators research that impedes the project of clarifying the regulatory effects of fragmentation.

In this volume, fragmentation is pursued in two of its dimensions: by Weil, centring on enforcement (Chapter 2) and by Freedland, at the level of theory and legal doctrine (Chapter 3). Both Freedland and Weil examine, through different frames of reference, the continuing disintegration of the employment relationship. Weil points to an acceleration in this disintegration process: an enduring and expanding fragmentation of employing entities. He characterizes the phenomenon as a 'fissuring' of employment, from large employers towards complex networks of subordinate firms. It is propelled by an armoury of distancing strategies, which include subcontracting, franchising, third-party management and the conversion of employment to self-employment. Larger businesses, as a consequence, no longer directly employ a significant number of workers. These 'lead firms', further, create competitive conditions that reduce customer costs but create pressure to lower labour costs, often with negative consequences for employment conditions.

Weil's analysis advances the theoretical underpinnings of fragmentation as an element of indeterminacy in labour regulation by situating employment fissuring at the intersection of three business strategies: the desire to gain competitive advantage through branding; the transfer of production to smaller entities as a cost-cutting measure; and the establishment and enforcement of brand standards by lead firms, to promote uniformity across associated enterprises. Weil's primary consideration is the implications of fissured employment for enforcement strategies, broadly defined. He cautions against any ready assumption that the association of fissured employment with poor working conditions can be remedied either by traditional methods of enforcement or by relying solely on the commitment of lead firms to corporate social responsibility tenets. Traditional mechanisms, he points out, tend to target the

workplace, while pressures towards non-compliance operate at a higher level. Weil concludes that strategic enforcement should be directed at the lead firm, and proposes strategies to this end. Enforcement agencies, he suggests, should carefully map business relationships in a sector, such as by tracking and comparing the records of units owned by the same franchisor. Specific outreach programmes can then be used in response to records of compliance, including where there is a history of systemic violations. As Weil observes, further, firms that rely on business strategies centred on brand reputation are sensitive to reputational damage. These incentives, in consequence, can operate as conduits to more effective regulation. To this end, Weil suggests 'targeted transparency', such as disclosure of standardized information on compliance with regulatory demands.

Paralleling the investigation of the repercussions of labour market fragmentation for enforcement strategy, labour law scholarship has addressed fragmentation in recent decades. The focus of this enquiry has been the doctrinal and statutory concepts that function to exclude the working relations generated by fragmentation from the full scope of protective standards. A body of work has tracked the declining coherence of one of the core tasks of employment law systems: the allocation of risks, duties and obligations among the parties to a working relationship (see, e.g., Davies and Freedland 2000; Deakin 2001). The profound restructuring of employing entities has been identified as crucial to generating fragmentation. More than 20 years ago, Collins (1990) highlighted the 'vertical disintegration' of employing entities into smaller units, distancing employees from the ultimate beneficiary of their labour. He enunciated the impact for labour regulation, in which a substantial cohort of the workforce is pushed beyond the 'standard' model of employment that is the paradigm of protected working relations in most legal frameworks and doctrinal schema.

In this volume, Freedland extends this line of research by exploring the relevance to the Regulating for Decent Work project of his recent collaborative effort to develop a concept of 'the legal construction of personal work relations [LCPWR]' (Freedland and Kountouris 2011). LCPWR captures the legal processes through which individual working relations are recognized as protected forms of labour market engagement. This work confirms the contingent nature of such processes, by exposing cross-cultural variations in the legal construction of personal work relations across European labour law systems. It also highlights the deeper theoretical currents that underpin the divergent outcomes: centrally, the dominant perception in each system of the appropriate

degree of autonomy of labour law systems from the mainstream of private law, and the extent to which freedom of contract is prized.

The legal construction of personal work relations also offers a number of other distinct contributions to the Regulating for Decent Work project. The role of labour market fragmentation as a component of regulatory indeterminacy has been illuminated in labour law scholarship in part by exploring the evolving tendency for working arrangements to be embedded within a web of relationships among a range of actors. The complexity of multilateral employment configurations has traditionally been obscured at the doctrinal level by an orthodoxy that envisages employment relations as exclusively bilateral (see in particular Davies and Freedland 2000). Freedland's chapter proposes a theoretical construct that would enable receptive legislators and adjudicators to advance the protection of workers in multilateral relations. The notion of the 'personal work nexus' is an attempt to capture the complexity of fissured employment in a doctrinal construct. To expand notions of employment beyond the bilateral default, it demands that the networks of actors in which contemporary employment relationships are embedded be understood to play a role in the legal construction of personal work relations, and therefore be recognized by labour law regimes.

The concept of LCPWR is also an aid to empirical studies that assess the impact of regulation. Two contributions are worth singling out. It has been observed, first, that recognizing legal indeterminacy precludes the simplistic regulation/deregulation dichotomy offered by mainstream economic discourses (Lee and McCann 2011b). Freedland provides a clarification: that regulation may become more intensive while offering less protection to workers by precipitating a 'demutualization' of labour market risks, by transferring them to workers as individuals. Further, measures that tend to demutualize risks are particularly likely to introduce greater precarity (vulnerability to the loss of or diminution of welfare). Second, Freedland offers the notion of 'differential integration of layers of regulation'. As he elaborates:

> [E]ven as between labour law systems which may display very closely comparable levels of intensity of regulation, there are considerable and important differences in the ways in which and the extent to which those labour law systems see different kinds or layers of regulation as linked or integrated with each other. (p. 74)

Differential integration is of some value, then, to efforts to investigate or predict differences in outcomes that emerge from comparable regulatory

interventions. One of its contributions is to illuminate the legal origins hypothesis (see above). Freedland points to a marked difference in how civil and common law systems envisage the relation between different modes of regulation. Common law systems, he observes, generally host a disintegrated account, in which statutory regulation is superimposed on a base of judge-made law. In civil law systems, in contrast, these different modes of regulation are understood to form an integrated hierarchy of norms.

Weil and Freedland's contributions, then, illustrate the advantages of bringing to bear the preoccupations and methods of scholarship from the social science and theoretical/doctrinal labour law traditions to the same sets of problems; in this case, to the nature of employment in contemporary economies and its repercussions for worker protection. These chapters converge on the complexity of the contemporary employment relationship. They also expose its elusiveness: to both conventional enforcement mechanisms and to traditional doctrinal strategies that usher working relations within the scope of labour law frameworks and attach legal responsibilities. Legal scholarship offers to other traditions an awareness of the complexity of legal notions of employment, of the allocation of risks and responsibilities among the parties, and of the adjustment of existing strategies. Research that approaches employment regulation through the lens of business organization exposes the incentives that underpin contemporary forms of fragmentation and reflects on the regulatory implications. Both suggest that innovation is possible.

Institutional interactions: the case of the minimum wage

The influence of institutional interactions on economic outcomes has been observed. A central criticism of the labour law indices of the Organisation for Co-operation and Development (OECD) and the World Bank is their neglect of interactions between labour law and cognate legal fields, such as company or insolvency law (Berg and Cazes 2008; Deakin and Sarkar 2008). Certain institutional interactions, however, take place between different elements of the labour law system. The economic impact narrative implicitly depicts labour law frameworks as static and constrained, a corollary of the formalist narrative outlined above. This literature assumes the influence of legal standards to be determined by their textual and institutional parameters. In contrast, this chapter suggests that labour law systems are better understood to harbour dynamic capacities beyond their textual demands. This feature of labour law systems is characterized as 'institutional dynamism'.